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No. 96-511

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

JANET RENO,
Attorney General of the United States, *et al.*,
Appellants,

v.

AMERICAN CIVIL LIBERTIES UNION, *et al.*,
Appellees.

On Appeal from the United States District Court for the Eastern District of Pennsylvania

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BRIEF OF APPELLEES AMERICAN LIBRARY ASSOCIATION, ET AL.

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QUESTIONS PRESENTED

1. Whether the three-judge district court was correct in preliminarily enjoining provisions of the Communications Decency Act of 1996 (the "CDA") that criminalize the sending or displaying of "indecent" or "patently offensive" speech, on the grounds that those provisions violate the First Amendment to the U.S. Constitution, because they effectively ban the communication of constitutionally protected speech among adults, do not directly and substantially further the government's stated interest, and are not narrowly tailored to serve that interest.

2. Whether the three-judge district court was correct in preliminarily enjoining the CDA on the grounds that the terms "indecent" and "patently offensive" "in context," which will be applied to millions of legally unsophisticated speakers engaged in an extraordinarily diverse range of communications in cyberspace, are so vague as to violate the First and Fifth Amendments to the U.S. Constitution.

PARTIES TO THE PROCEEDINGS

Appellants are Janet Reno, the Attorney General of the United States, and the United States Department of Justice. The "ALA Appellees" are American Library Association, Inc., America Online, Inc., American Booksellers Association, Inc., American Booksellers Foundation for Free Expression, American Society of Newspaper Editors, Apple Computer, Inc., Association of American Publishers, Inc., Association of Publishers, Editors and Writers, Citizens Internet Empowerment Coalition, Commercial Internet Exchange Association, CompuServe Incorporated, Families Against Internet Censorship, Freedom to Read Foundation, Inc., Health Sciences Libraries Consortium, Hotwired, Inc., Interactive Digital Software Association, Interactive Services Association, Magazine Publishers of America, Microsoft Corporation, The Microsoft Networks, L.L.C., National Press Photographers Association, Netcom On-line Communications Services, Inc., Newspaper Association of America, Opnet, Inc., Prodigy Services Corp., Society of Professional Journalists, and Wired Ventures, Inc. The "ACLU Appellees" are the American Civil Liberties Union, Human Rights Watch, Electronic Privacy Information Center, Electronic Frontier Foundation, Journalism Education Association, Computer Professionals for Social Responsibility, National Writers Union, Clarinet Communications Corp., Institute for Global Communications, Stop Prisoner Rape, AIDS Education Global Information System, Bibliobytes, Queer Resources Directory, Critical Path AIDS Project, Inc., Wildcat Press, Inc., Declan McCullagh d/b/a Justice on Campus, Brock Meeks d/b/a Cyberwire Dispatch, John Troyer d/b/a The Safer Sex Page, Jonathan Wallace d/b/a The Ethical Spectacle, Planned Parenthood Federation of America, Inc.

Pursuant to this Court's Rule 29.6, the ALA Appellees list the following parent companies and nonwholly owned subsidiaries of the corporate parties among them: Digital

Marketing Services, Inc., H & R Block, Inc., International Wireless, Inc., Prodigy, Inc., Netcom Canada, Inc., and SonicNet, Inc.

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BRIEF OF APPELLEES AMERICAN LIBRARY ASSOCIATION, ET AL.

STATEMENT

Until very recently, the mass media have consisted of a limited number of privileged speakers communicating to essentially passive audiences. The communications medium of the twenty-first century—the Internet—is changing that. It allows millions of average individuals to communicate to and with millions of other individuals on a global scale never before possible, and to gain access to a vast amount of information originating world-wide.

The Communications Decency Act of 1996 (the "CDA" or "Act")[1] criminalizes a broad range of constitutionally

[1] The CDA was enacted as Title V of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 133 (1996) (to be codified at 47 U.S.C. § 223(a) to (h)). References are to the provisions as they will be codified.

protected, but "indecent" or "patently offensive," communications on the Internet if they are sent or made "available" to minors.[2] The Act's prohibition is tempered only by affirmative defenses, which the three-judge district court found cannot be used by the vast majority of Internet speakers. The CDA thus operates as a *ban* on most "indecent" speech in "cyberspace," and reduces the adult population to reading and viewing only what is appropriate for children.

1. The Statutory Provisions at Issue. The provision of the CDA principally at issue here, 47 U.S.C. § 223 (d)(1)(B), makes it a felony, punishable by up to two years in prison and a fine, to use an "interactive computer service to display in a manner available to a person under 18 years of age," any communication that "in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs." Other sections criminalize the use of an "interactive computer service to send to a specific person or persons under 18 years of age" any such "patently offensive" material (§ 223(d)(1)(A)), and the use of a "telecommunications device" to make or create and "initiate[] the transmission of any . . . communication which is . . . indecent, knowing that the recipient of the communication is under 18 years of age." *Id.* § 223(a)(1)(B)(ii).

The "indecent" and "patently offensive" standards are not further defined in the Act. The Conferees used the terms interchangeably and indicated they intended to adopt the broadcast standard utilized by the Federal Communications Commission ("FCC") that was discussed in *FCC*

[2] Appellees did not challenge the Act's application to obscenity, child pornography, harassment or child solicitation. Most of the examples of online speech relied upon by the sponsors of the CDA (including Senator Exon's so-called "Blue Book") and cited in the briefs of *amici* supporting the Government could be prosecuted under those standards, and the preliminary injunction at issue here does not enjoin those prosecutions. *See* J.S. App. 8a, 149a, 151a.

v. Pacifica Foundation, 438 U.S. 726 (1978). S. Conf. Rep. No. 104-230, at 188 (1996) ("Conf. Rep.").

Congress enacted two affirmative defenses relevant here. First, it is a defense if the speaker "has taken, in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors to a communication specified in [the Act], which may involve any appropriate measures to restrict minors from such communications, including any method which is feasible under available technology." 47 U.S.C. § 223(e)(5)(A).[3] The second defense applies to a speaker who "has restricted access . . . by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number." *Id.* § 223(e)(5)(B).

2. Appellees. Appellees include individuals, libraries, small non-profit organizations, educational societies, and bookstores, as well as the world's largest providers of access to the Internet.[4] All of their speech is appropriate and constitutionally protected for adults. The vast majority, if not all, is appropriate for most minors as well. *None* is the kind of "pornography" the Government contends is the focus of the Act. Nevertheless, Appellees engage in or provide access to speech that, in some communities, could be considered "indecent" or "patently offensive," such as information about sexual issues and problems, images and text that depict sexually oriented subjects, and discourse and debate that contain the "seven dirty words" at issue in *Pacifica*.[5]

[3] Although the FCC is permitted to opine as to what measures might qualify under this defense, compliance with FCC guidelines does not preclude prosecution or conviction. *Id.* § 223(e)(6). At any rate, the FCC has not specified *any* measures that, in its view, should be regarded even as evidence of "good faith."

[4] A full listing of Appellees in these two consolidated cases appears at p. ii *supra*.

[5] For illustrations of Appellees' speech *see* Point I *infra*, the Statement of the Case of the ACLU Appellees, and paragraphs 70

3. Proceedings Below. The three-judge district court conducted a five-day evidentiary hearing, during which it received extensive expert testimony (including a demonstration of how the Internet and parental control options work) and voluminous documentary evidence (including scores of affidavits and 356 stipulated facts). Based on that evidence, the court unanimously held that the Act violates the First Amendment because it effectively bans constitutionally protected speech among adults, would not directly and materially further the Government's interest in preventing minors from gaining access to indecent online speech, and is not the least restrictive means available to serve that interest. J.S. App. 67a-83a (Sloviter, C.J.), 86a-87a (Buckwalter, J.), 102a-147a (Dalzell, J.). Two judges also concluded that the terms "indecent" and "patently offensive" are unconstitutionally vague. *Id.* at 80a (Sloviter, C.J.), 84a-85a (Buckwalter, J.).

The district court made extensive factual findings to support its legal conclusions. *See* J.S. App. 11a-61a. The findings focused on the nature of the Internet (*id.* at 12a-20a), the different ways of communicating in cyberspace (*id.* at 21a-42a), the nature and content of online speech (*id.* at 42a-52a), and the inability of most speakers to use the CDA's affirmative defenses (*id.* at 52a-61a).

Specifically, the court found that anyone with access to the Internet can use it to exchange ideas, research, poetry, images, or literature, on a global basis, virtually instantaneously. J.S. App. 13a-14a. Worldwide, almost ten million host computers are linked to the Internet (of which 40 percent or more are located outside the United States), and the number of Internet users is predicted to grow from over 40 million today to 200 million by 1999. *Id.* at 13a, 59a. Most American homes gain access to the Internet through major "online service providers" such as Appellees America Online, CompuServe,

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through 356 of the parties' stipulation of facts (adopted as findings of the district court, J.S. App. 12a n.9).

the Microsoft Network, and Prodigy. *Id.* at 19a. At the time of trial, the major online service providers had about twelve million individual subscribers across the United States. *Id.* at 19a-20a. *See also id.* at 17a-19a (noting other means of gaining access).

The court also found that the Internet comprises quite different methods of communication. *Id.* at 21a. The simplest method, "e-mail," allows an individual to transmit a message to a specific individual or individuals. *Id.* at 21a-22a. Additionally, the Internet includes thousands of automatic mailing list services (called "listservs" or "mail exploders"), which allow subscribers to transmit messages on a given topic and have those messages automatically forwarded (via e-mail) to every other subscriber. *Id.* at 22a.

"Newsgroups" are open forums for discussing particular topics. J.S. App. 23a. A message "posted" to a newsgroup is automatically forwarded to all computers that provide access to that newsgroup. *Id.* There are newsgroups on more than 15,000 subjects. *Id.* at 24a. Each day, approximately 100,000 new messages are posted to newsgroups and are distributed to approximately 200,000 computers; individuals can review and reply to those messages at any time. *Id.* at 23a-24a.

"Chat rooms" allow individuals to send messages that almost immediately appear on the computer screens of other individuals participating in that conversation, who can immediately reply. *Id.* at 24a-25a.

Another distinct mode of communication is the "World Wide Web." *Id.* at 25a. Speakers on the Web can display text and graphic information on their "Web sites," and may also include "links" to other information or resources posted by other speakers on computers all around the world. *Id.* at 25a-26a. Using these "hyperlinks," an individual can "click" using a computer mouse and be immediately connected to the resource itself. *Id.* at 26a.

With all of these methods of online communication (except e-mail directed to a specific individual), no information flows to a particular individual unless that individual affirmatively requests the information, and when an individual makes such a request, it is usually clear what type of content will be delivered. J.S. App. 48a-49a. In addition, speakers generally do not know the age or other specific identifying information about the recipients of their speech. *Id.* at 49a-51a.

The district court found that content on the Internet "is as diverse as human thought." J.S. App. 43a. The court recognized that some of that content could be deemed "indecent," but found "[t]here is no evidence that sexually-oriented material is the primary type of content on this new medium." *Id.* at 47a. Moreover, a substantial amount of indecent material is posted abroad. *Id.* at 59a, 145a (Dalzell, J.). And "[f]oreign content is otherwise indistinguishable from domestic content . . . since foreign speech is created, named, and posted in the same manner as domestic speech." *Id.* at 59a.

The court found that parents can protect their children from online content the parents deem inappropriate. J.S. App. 32a-42a. The major online service providers offer parental control options free of charge. *Id.* at 41a-42a. These controls permit parents to block access to the Internet entirely, or to block access to specific modes of communication (such as newsgroups or chat rooms), to all visual images, or to all of the Internet except for areas the service provider has determined are appropriate for children. *Id.*[6] Software, which can be utilized on home computers to enable parents to block or to filter the access of their children to material on the Internet, is also readily available. *Id.* at 32a-35a. These "user-based" parental control options block or screen speech regardless of whether it is posted domestically or abroad. Duvall

[6] *See* Burrington Test., Tr. Vol. III, at 43:8-14.

Test., Dec. ¶ 41, Jt. App. 104-105; Duvall Test., Tr. Vol. I, 161:17-162:18, Jt. App. 106-107.

The district court found as fact that, for *most* methods of communication over the Internet, including newsgroups, listservs and chat rooms, *it is not technologically possible* for a *speaker* to restrict the availability of his or her speech to adults. J.S. App. 47a, 49a. *See also id.* at 50a (noting that the Government's expert agreed).

Indeed, the district court found there is only one mode of communication in cyberspace—the World Wide Web—where it is even technologically possible to screen for age, by using an interactive computer program called a "cgi script." *Id.* at 51a. The court found, however, that speakers who publish on Web sites provided by the major online service providers cannot use cgi scripts. *Id.* For those speakers, there "is no method currently available . . . to screen recipients online for age." *Id.* Moreover, the district court found that even for most Web speakers who have the capability to screen for age, doing so would be "prohibitively expensive." *Id.* at 74a (Sloviter, C.J.) (summarizing factual findings). Thus, the *only* speakers who would have both the technological and practical ability to screen for age are *commercial* speakers who charge money for access to the speech on their Web sites. *Id.* at 61a. But the court found that "[t]he Internet is not exclusively, or even primarily, a means of commercial communication." *Id.* at 43a. To the contrary, its principal use is for expression made available by the speaker free of charge. Accordingly, the district court concluded that "[t]he CDA's defenses . . . are effectively unavailable for non-commercial, not-for-profit entities," so that "[m]any speakers . . . on the Internet must choose between silence and the risk of prosecution." *Id.* at 61a.

Based on its findings, the court preliminarily enjoined enforcement of all three challenged sections of the CDA

as applied to indecent speech. J.S. App. 62a, 148a-152a.[7] The Government appealed and this Court noted probable jurisdiction.

SUMMARY OF ARGUMENT

1. The CDA criminalizes a broad range of constitutionally protected "indecent" speech. The Act covers not only the "commercial" purveyors of "pornography" that are the focus of the Government's argument, but also non-commercial speakers (who constitute the vast majority of all speakers in "cyberspace") as well as non-prurient images and text that have serious value for adults and many minors. Indeed, the Act by its terms applies to the speech of "libraries and educational institutions"—speakers hardly likely to be found selling "pornography."

2. The district court correctly found that the CDA operates as an unconstitutional *ban* of indecent speech among adults in cyberspace. Because of the nature of the Internet, the Act's prohibition on displaying indecent expression in a manner "available" to minors makes it virtually impossible to communicate an indecent message to adults. As this Court has held for forty years, such a ban violates the First Amendment. *See, e.g., Sable Communications v. FCC*, 492 U.S. 115, 126-27 (1989).

The Government nevertheless argues that the CDA's draconian impact on protected speech will be eliminated by the affirmative defenses Congress provided. That argument ignores the district court's detailed factual findings, none of which is challenged here. Based in part on the testimony of the Government's own expert, the district court found that it is *technologically impossible* for speakers to utilize those defenses when they are speaking in all

[7] In a separate challenge, another three-judge district court, relying in part on the record in this case, preliminarily enjoined enforcement of § 223(d)(1)(B). *Shea v. Reno*, 930 F. Supp. 916, 944 (S.D.N.Y. 1996). The Jurisdictional Statement in that case, No. 95-595, is currently pending before this Court.

but one of the modes of communicating in cyberspace. Thus, the Act completely bans all "indecent" speech by users of newsgroups, listservs and chat rooms.

The Government argues that the Act should nevertheless be upheld because speakers using *one* of the modes of communication on the Internet—the World Wide Web—can use the Act's affirmative defenses. But the district court found that many Web sites cannot screen for age, and even where screening is possible it would be prohibitively expensive for speakers other than commercial entities that charge money for access to their speech. The existence of this very limited outlet for indecent expression on the Internet does not make the Act any less of a ban of speech for the vast majority of speakers.

3. The district court also correctly concluded that the CDA is not likely to survive the strict scrutiny such a content-based burden on protected speech requires, because the Act will not directly and materially advance the Government's interest in preventing minors from gaining access to indecent expression, and because there are far more effective alternatives that would impose *no* burden on protected speech. Of all the indecent communications on the Internet, a very large percentage are posted abroad, and there is no speaker-based control government can impose that would prevent those communications from being available to every home that has access to the Internet. Thus, because of the global nature of the Internet, the CDA cannot and will not prevent minors from gaining access to indecent material.

But parents can prevent access by their children. The vast majority of American families connected to the Internet subscribe to one of the major online service providers, which enable parents either to block or to screen selectively their children's access. Other filtering software is also available. If parents exercise parental responsibility, they can prevent their children from accessing indecent communications, including communications posted abroad.

If they do not, no government regulation of speakers can prevent minors from gaining access to indecent communications.

In addition, such "user-based" blocking or screening would have *no* effect on the ability of adults to communicate and to receive constitutionally protected, though indecent, messages and images. By contrast, the "speaker-based" prohibitions of the CDA chill speech among adults and reduce the adult population to reading and viewing only what is suitable for children.

4. The district court also correctly concluded that the CDA is likely to be found unconstitutionally vague. Below, the Government's lawyers and experts could not begin to explain how speakers could determine what speech the CDA criminalizes. The *amicus* brief filed in this Court by the CDA's principal Congressional sponsors dramatically underscores the intractable vagueness of the Act's criminal prohibitions. The brief acknowledges that even material with "truly serious value" could be found criminal if a jury determined, on an *ad hoc* basis, that a "host of" other (named and unnamed) "variables" outweighed the value of the speech.[8] It is hard to imagine a criminal standard that provides less guidance, or to conceive of a speech prohibition that would have a broader chilling effect—particularly given that it must be understood and applied by millions of individual speakers, often speaking spontaneously and without benefit of legal advice.

5. The Government's attempt to salvage two sections of the CDA, §§ 223(a)(1)(B) and 223(d)(1)(A), by redefining their scope, is unavailing. First, even as redefined on appeal, these provisions would apparently have the same unconstitutional impact on speech among adults as the "display" provision. Second, the Government's reliance on *Ginsberg v. New York*, 390 U.S. 629 (1968), is entirely misplaced. Unlike the CDA, the statute at issue in *Ginsberg* prohibited only the *commercial sale* of books deemed "harmful to minors" when the bookseller knew the purchaser was a minor, and it had *no* effect on sales to adults. Third, the Government's redefinition of these provisions does not eliminate their unconstitutional vagueness. Thus, the district court properly enjoined enforcement of all three challenged provisions. But if there is any question about these two, the proper course is to affirm the preliminary injunction and allow the Government to develop its new arguments on remand in opposition to permanent relief.

[8] Br. of *Amici* "Members of Congress" at 13 ("Under the 'online indecency' test, the Government need not affirmatively prove the presence of prurience or lack of serious value.").

6. Finally, the Court should decline the Government's invitation to rewrite the Act, and should leave to Congress the delicate policy judgments any narrowing construction would require. Congress did not fully understand the Internet, or what can and cannot be done in cyberspace, and it is impossible for this Court to discern how Congress would have legislated if it had had the benefit of the comprehensive record compiled in this case. The Internet may prove to be the most important communications medium of the twenty-first century, and any attempts to regulate speech in that medium should be undertaken with the care and precision such a speech-enhancing medium deserves.

ARGUMENT

I. THE CDA CRIMINALIZES A BROAD RANGE OF SPEECH WITH SERIOUS VALUE.

Although the Government's brief focuses almost exclusively on "commercial" purveyors of "pornography" (Gov. Br. 6, 16, 34-36, 46-47), the district court found, and the Act itself makes clear, that the CDA criminalizes a much broader range of speech.

First, unlike the dial-a-porn law upon which the CDA is purportedly modeled, the CDA is *not* expressly limited to "commercial" speakers—those who charge listeners a

fee to obtain their speech.[9] To the contrary, the Conference Report confirms that Congress intended "content regulations of both commercial and non-commercial providers." [10]

Second, the Act also plainly applies to a far wider range of speech than "pornography." It is expressly made applicable to "libraries and educational institutions," 47 U.S.C. § 230(e)(2), and they are certainly not pornographers.

Third, the Act by its terms applies not only to visual "depict[ions]" and "image[s]", but also to textual "comment[s]" and "descri[ptions]." §§ 223(a)(1), 223(d)(1). Indeed, Congress intended to adopt the patent offensiveness standard discussed in *Pacifica*, and *Pacifica* involved only crude language, not pornography. *See* Conf. Rep. at 187-89. Accordingly, the Government's expert acknowledged it is reasonable for speakers to fear that any Internet communication containing some or all of the "seven dirty words" at issue in *Pacifica* may constitute a felony. *See* Olsen Test., Tr. Vol. V, 53:16-54:10.

Fourth, as the district court concluded, the CDA does not exempt speech of serious value. J.S. App. 61a, 76a (Sloviter, C.J.), 98a-99a (Buckwalter, J.), 115a-119a (Dalzell, J.). Congress deliberately rejected the narrower "harmful-to-minors" standard at issue in *Ginsberg v. New York*, 390 U.S. 629 (1968), which does not criminalize speech with serious value (and also exempts patently offensive speech if it is not "prurient"). *See* Conf. Rep. at 189. In enforcing the standard on which the CDA is based, the FCC has expressly declined to hold that "if a

[9] *Compare* 47 U.S.C. § 223(b)(2)(A) (criminalizing indecent telephone communication made "*for commercial purposes*") (emphasis added).

[10] Conf. Rep. at 191. The Government's trial evidence regarding prohibited speech included repeated references to newsgroups, even though speech through newsgroups is not "sold." Senator Exon also referred to newsgroups as a principal target of the legislation. *See* 141 Cong. Rec. S8089 (daily ed. June 9, 1995).

work has merit, it is per se not indecent." *Letter to Merrell Hansen*, 6 F.C.C. Rcd 3689 (1990) (citation omitted).[11] The FCC has ruled that speech may be found "patently offensive" even when it is presented "in the news . . . in a serious, newsworthy manner." *Id.*[12]

Everything from online sex education, medical information, literature, art, music, and politics to everyday discourse may contain content of a sexual or "vulgar" nature. Accordingly, Appellees and their members legitimately fear prosecution precisely because the CDA applies even to speech with serious value. *See* J.S. App. 12a n.9, 116a-119a (Dalzell, J.). The Government's witnesses confirmed the validity of those fears. For example, Howard Schmidt (called as an expert to demonstrate that images subject to the Act could be accessed on the Internet) testified that the publisher of *Vanity Fair* Magazine could be liable under the Act for posting online a nude cover picture of the actress Demi Moore (even though the *print* publication of that same image was entirely lawful). See Schmidt Test., Tr. Vol. IV, 138:23-139:14, Jt. App. 118-119. As the court concluded, based on the evidence and "colloquy with the government attorneys," the CDA "cover[s] a broad range of material from contemporary films, plays and books showing or describing sexual activities . . . to controversial contemporary art and photographs showing sexual organs in positions that the government conceded could be patently offensive in some communities." J.S. App. 76a-77a (Sloviter, C.J.).

[11] *See also Gillett Communications of Atlanta, Inc. v. Becker*, 807 F. Supp. 757 (N.D. Ga. 1992) (holding TV broadcast of political advertisement by a candidate for public office was indecent), *appeal dismissed*, 5 F.3d 1500 (11th Cir. 1993). Indeed, in *Pacifica*, this Court did not suggest that George Carlin's satirical monologue lacked serious value. *See Action For Children's TV v. FCC*, 852 F.2d 1332, 1340 n.13 (D.C. Cir. 1988) (concluding monologue "may be an example of indecent material possessing significant social value").

[12] The Government and its *amici* disagree as to the weight serious value should be given among the "host of variables" to be considered by the jury, which highlights the vagueness of the terms "indecent" and "patently offensive." *See infra* Point IV.

II. THE CDA UNCONSTITUTIONALLY BANS THE DISSEMINATION TO ADULTS OF SPEECH THAT IS "INDECENT" BUT CONSTITUTIONALLY PROTECTED FOR ADULTS.

After careful consideration of an extensive record, the district court unanimously held that the CDA "would effect a complete ban even for adults" of "indecent" but constitutionally protected expression. J.S. App. 74a (Sloviter, C.J.); *see id.* at 84a (Buckwalter, J.), 136a (Dalzell, J.). The Government concedes that, under the First Amendment, "government generally may not adopt an outright ban on the dissemination of indecent material to adults." Gov. Br. at 22 (citing *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989)). It seeks to avoid this principle by narrowing the concept of a "ban" to the point where it becomes meaningless, and rearguing, without evidentiary basis, the facts concerning the actual impact of the CDA.[13] Neither argument has merit.

[13] Although it quarrels with some "facts" found below (and simply ignores the rest), the Government does not claim those findings are "clearly erroneous." Nor does it argue for a less deferential standard of review. Although this Court has held that appellate courts may conduct an "independent review" of the facts in First Amendment cases to assure that free-speech rights have not been unduly abridged through spurious findings of fact, *Bose Corp. v. Consumers Union, Inc.* 466 U.S. 485, 510-11 (1984), that rule does not afford "special protection for the government's claim that it has been wrongly prevented from restricting speech." *Planned Parenthood Ass'n v. Chicago Transit Auth.*, 767 F.2d 1225, 1229 (7th Cir. 1985). Where, as here, the special First Amendment concerns animating the rule are absent, there is no basis to depart from the deferential standard of fact review required by Fed. R. Civ. P. 52(a). In any event, the Government's scattered disagreements with the facts found below are not supported by citations to contrary evidence in the record, and the findings below have overwhelming support in the record.

A. The Government Cannot Constitutionally Ban Indecent Speech From a Medium of Communication Used by Adults in Order to Prevent Children From Seeking Access to That Speech.

This Court has repeatedly held that the goal of protecting children cannot justify the suppression of constitutionally protected but indecent speech in a given medium. As the Court put it last Term in *Denver Area Educ. Tele. Consortium, Inc. v. FCC*, 116 S. Ct. 2374 (1996), even where it is clear that "[n]o provision . . . short of an absolute ban . . . offer[s] certain protection against assault by a determined child," that fact does not justify "'"'reduc[ing] the adult population . . . to . . . only what is fit for children.'"'" *Id.* at 2393 (quoting *Sable*, 492 U.S. at 128, which quoted *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 73 (1983), which in turn quoted *Butler v. Michigan*, 352 U.S. 380, 383 (1957)). *See id.* at 2416-17 (Kennedy, J., joined by Ginsburg, J.).[14]

"The level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox," and this is so "*regardless* of the strength of the government's interest" in protecting children. *Bolger*, 463 U.S. at 74-75 (emphasis added). Government may not constitutionally "quarantin[e] the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence . . . . Surely this is to burn the house to roast the pig." *Butler*, 352 U.S. at 383. These principles compel the district court's ruling here.

[14] As the cases cited in *Denver Area* demonstrate, this bedrock principle has already been applied in the context of sale or distribution of immoral books and other printed materials (*Butler*), use of the postal service to mail unsolicited commercial advertisements about contraceptives to homes (*Bolger*), and use of the telephone to sell indecent "dial-a-porn" messages (*Sable*).

B. The District Court Found as a Fact That the CDA Operates as a Ban.

In *Sable*, the Court stressed that, even if a law does not expressly ban indecent speech, it is unconstitutional if it has the "*effect* of limiting the content of adult [communications] to that which is suitable for children." 492 U.S. at 131. The CDA, which requires Internet speakers to assure that their indecent expression is not "available" to minors, has precisely such an unconstitutional effect for most speakers and most modes of communication, because there is no way to satisfy that requirement other than by refraining from speech.[15]

Newsgroups, listservs, chat rooms, and Web sites, are (from the point of view of the *speaker*) "public spaces" open to all.[16] For that reason, as the district court recog-

[15] The Government hints that the rule barring government from banning indecent speech may not apply when there are "no reasonably effective alternative" means of protecting children from indecent materials. Gov. Br. at 22. Here, there are effective alternatives. J.S. App. 32a-42a; *see infra* at 34-37. Further, the Government's suggestion finds no support in the relevant cases, which expressly recognize that alternative regulatory approaches will *not* protect all children from exposure, but conclude that this cannot justify a complete ban on adult access. *See Denver Area*, 116 S. Ct. at 2393; *Sable*, 492 U.S. at 130; *see also Riley v. National Fed. of the Blind*, 487 U.S. 781, 795 (1988) (although less intrusive means may not serve government's interests as effectively, "the First Amendment does not permit [Congress] to sacrifice speech for efficiency"). Moreover, Congress did *not* decide to ban speech among adults in the CDA. Because it misunderstood the nature of the Internet, Congress thought it could *protect* indecent speech between adults while regulating speech available to children. *See* Jim Exon, *The Communications Decency Act*, 49 Fed. Comm. L.J. 95, 95 (1996) ("The new law does not ban any constitutionally protected material from adults."); Br. of Members of Congress at 7-8. There is no need to consider overturning the *Sable* rule unless and until Congress makes the policy choice to ban speech among adults in order to protect minors.

[16] The analogy to "public spaces" does not apply, however, to the recipients of speech on the Internet, who must go in search of material with a given content and can control its entry into the home. Thus, concerns about unwilling exposure to "indecent"

nized, virtually all Internet speech that is available to adults will also be available to minors. J.S. App. 47a-48a. As a result, if § 223(d)(1)(B)—barring indecent speech that is "available" to minors—stood alone, that provision would prevent use of virtually all methods of communication on the Internet for the transmission of "indecent" messages or images to adults.[17] Because such a ban would clearly be unconstitutional, the only real question here is whether the affirmative defenses transform the Act into a valid regulation of speech to minors. They do not.

It is a defense that a speaker screened out minors by "requiring use of a verified credit card, debit account, adult access code, or adult personal identification number." § 223(e)(5)(B). But the Government's technology expert conceded, and the district court found, that this defense is *technologically unavailable* to speakers who use most modes of communication on the Internet. J.S. App. 49a-50a. The court "found that no technology exists which allows those posting on the category of newsgroups, mail exploders [listservs] or chat rooms to screen for age." *Id.* at 74a (Sloviter, C.J.) (summarizing factual findings); *see also id.* at 84a (Buckwalter, J.) ("[C]urrent technology is inadequate to provide a safe harbor to most speakers on the Internet."). This means that speakers using those modes of communication

> would have to reduce the level of communication to that which is appropriate for children in order to be protected under the statute. This would effect a *complete ban* even for adults of some expression, albeit "indecent," to which they are constitutionally entitled. and thus would be unconstitutional under the holding in *Sable* . . . .

Id. at 74a (Sloviter, C.J.) (emphasis added).

material that might arise if speech were publicly displayed on street corners or in other truly "public" places do not apply to speech displayed in cyberspace. *See* J.S. App. 49a; *infra* at 26-27.

[17] The sole exception would be an e-mail transmission to a recipient known to be an adult who is known to be using a computer that will not be accessible to a minor.

In fact, there is only one mode of communication on the Internet where it is technologically possible for the speaker to screen for age—the World Wide Web—and even that alternative is not available to most speakers. First, most Internet speakers do not have Web sites. Second, only Web sites that have the capacity to use a "cgi script" can screen for age, and *none* of the Web sites available to the 12 million subscribers to the major online service providers has that capacity. *Id.* at 51a. Thus, speakers who wished to screen for age would have to establish their own independent Web sites with cgi script capability, which takes time and costs money.[18]

Moreover, even for those speakers who have Web sites with the technological ability to screen for age, the district court further found that, "as a practical matter, non-commercial organizations and even many commercial organizations using the Web would find it prohibitively expensive and burdensome to engage in the methods of age verification proposed by the government." *Id.* at 74a (Sloviter, C.J.) (summarizing findings of fact); *see id.* at 53a (findings of fact) (there is no reason to believe that credit card companies would verify cards not being used for purchases and, even if they did, "the fee charged . . . to process a card, whether for a purchase or not, will preclude use of a credit-card verification defense by many non-profit, non-commercial Web sites").[19] It would also

[18] The Government's expert acknowledged, for example, that it would cost between $1,000 and $10,000 for a speaker to establish his own Web server, and it would cost even more to maintain the data bases required for age verification. J.S. App. 44a-45a. *See also id.* at 55a; Anker Test. Dec. ¶ 12-13.

[19] The district court also found that use of a credit-card verification system significantly delays information retrieval, and noted that the Government's expert "agreed that even 'a minute is [an] absolutely unreasonable [delay] . . . . [P]eople will not put up with a minute." J.S. App. 54a. In addition, the court found such a system would completely bar communication with adults who do not possess cards, *id.*, and would discourage others from retrieving a speaker's information, *id.* at 55a.

be wholly impractical for most such speakers to create their own adult access code systems. *Id.* at 55a.

Finally, the Government made *no* showing that third-party "age verification systems," which charge *listeners* for access to speech, are a practical option for Web speakers who wish to make their expression available for free. Although the Government now emphasizes this potential method of screening minors, below it "offered very limited evidence" regarding this possibility. J.S. App. 55a. The evidence did show, however, that "adult users, particularly casual Web browsers, would be discouraged from retrieving information" if this or any other form of password screening were required. *Id.* Existing age verification systems "appear to be used for accessing commercial pornographic sites." *Id.* Registering with those systems means associating your name with people who want to view "pornographic" sites. Even the Government's expert acknowledged that he would not be willing to register his name with such a system, and admitted he did not know whether those systems protected the privacy of registrants or sold their lists to others. Olsen Test. Tr. Vol. IV, 251:1-23, 255:1-22, Jt. App. 129-130, 132.[20] Thus, the only potential listeners who are likely to go to the trouble and expense of purchasing, in advance, adult ID's are persons interested in obtaining a large volume of sexually explicit material from commercial services. Few, if any, individuals will purchase such an ID in order to make a one-time visit to a Web site providing safe sex information or displaying controversial photographs in the tradition of Robert Mapplethorpe. *See* J.S. App. 55a.

Moreover, even assuming that some adults would undertake the expense and advance planning necessary to obtain an "adult ID," speakers would still face the often un-

[20] *See Denver Area*, 116 S. Ct. at 2391 (holding that an advance registration requirement was unduly burdensome because it required "considerable advance planning" to receive covered speech and because it would "restrict viewing by [those] who fear for their reputations should the operator, advertently or inadvertently, disclose the list").

surmountable task of reviewing all of their content to determine what parts of it might be "indecent." As the district court found, it would be economically impossible for many speakers to segregate their speech into "decent" and "indecent" areas. J.S. App. 55a, 57a. For example, it would cost the Carnegie Library of Pittsburgh millions of dollars to review the material it posts online in order to be able to segregate material that could be deemed "indecent." *Id.*; Croneberger Test. Decl. ¶¶ 32-35, Jt. App. 161-162. The only alternative for such speakers would be to designate *all* of their speech as indecent and require an "adult ID" for all content, thereby dramatically reducing the potential adult audience for all of their speech, and totally eliminating minors' access even to the non-indecent speech.

With respect to the "good faith" defense provided in § 223(e)(5)(A), the undisputed evidence showed that it does *nothing* to reduce the impact of the Act's criminal prohibitions. There simply are no "actions" a speaker can take that are sufficiently "effective" to provide reasonable assurance that minors will not gain access to a given communication. "[T]here is no such technology at this time." J.S. App. 79a.

In the district court, the Government's primary attempt to give meaning to the "good faith" defense was its argument that speakers could "tag" indecent speech with some identifier such as "L-18" or "XXX." But the Government steadfastly refused to say that such tagging would today constitute a defense under § 223(e)(5)(A).[21] Now, on

[21] *See* J.S. App. 58a ("Neither plaintiffs nor the Government suggest that tagging alone would shield minors from speech or insulate a speaker from criminal liability under the CDA."); *id.* at 79a. The reason is that "[t]here is no way that a speaker can use current technology to know if a listener is using [the] screening software" required to recognize and block tagged speech. *Id.* at 58a; *see id.* at 79a. In fact, computer browsers can use tags, such as "L-18" or "XXX" to *search for* and *retrieve* the tagged speech. It is clear the authors of the CDA did not view tagging as a defense. A principal concern expressed by Senator Exon, the CDA's chief sponsor, was the fact that sexually explicit text and

appeal, the Government only suggests that "tagging" might *become* a defense in the future, Gov. Br. at 38—a possibility that remains irrelevant to the ability of a speaker to comply with the CDA today.

Because of the technological and practical limitations on the availability of the Act's defenses, all indecent speech in newsgroups, listservs and chat rooms, and most indecent speech on Web sites, would have to be suppressed. The *only* speakers who would not be significantly affected are "commercial pornographers," because they already require payment by credit card for access to their speech. J.S. App. 135a.[22] The real impact of the Act will be on Appellees and the millions of other speakers who are not "pornographers." For example, the Act would have a truly devastating impact on libraries and on other non-commercial Web sites that post lawful but arguably "indecent" words and images for artistic, political or instructional purposes. All of that speech would effectively be banned.[23]

images *are* tagged with labels such as "XXX" that facilitate searches for this material. *See, e.g.*, 141 Cong. Rec. S8089 (daily ed. June 9, 1995). Moreover, Congress did not believe this defense could be used by most speakers today. The Conference Report merely said that "content selection standards" and "other technologies" that are *"currently under development, might* qualify" as defenses "if they are effective at protecting minors from exposure to indecent material via the Internet." Conf. Rep. at 190 (emphasis added).

[22] The most the Government can claim is that the CDA will force these "pornographers" also to charge for access to the "teasers" some currently make available for free. There was no evidence that such teasers are more than a minuscule amount of the "indecent" expression regulated by the Act.

[23] The consequences of such a ban were aptly described by Justice Kennedy just last Term: "Indecency often is inseparable from the ideas and viewpoints conveyed, or separable only with loss of truth or expressive power." *Denver Area*, 116 S. Ct. at 2415-16 (Kennedy, J., joined by Ginsburg, J.).

C. The Government Has Advanced No Legal or Factual Basis for Overturning the District Court's Conclusion That the CDA Operates As an Unlawful Ban.

The Government nevertheless argues that the CDA passes constitutional muster because it operates not as a ban but as a reasonable "restriction on the place and manner" in which indecent expression may be communicated. Gov. Br. at 39.[24] This argument is completely unpersuasive.

First, it reflects an unprecedently narrow understanding of what it means to "ban" speech. Under the Government's view, a law that makes it impossible for a speaker to speak to a particular newsgroup, listserv, or chat room audience he wishes to reach is not a "ban" if the speaker can post the same message on a Web site, where it will be available to a different audience at a different time. Gov. Br. at 40.[25] That is like arguing it is constitutionally permissible to ban leaflets, newspapers or magazines because the speaker could publish a book.

Moreover, the Government is even forced to argue that, in determining whether alternative modes of communication provide "reasonable opportunities" to speak, the Court should "limit its consideration to technical feasibility." Gov. Br. at 39-40. It contends that, in reviewing a content-based restriction on protected speech, this Court must *assume* that all speakers can use Web sites to screen for minors even though the district court found as a fact that Web site screening is prohibitively expensive for most

[24] The Government's apparent reliance on First Amendment principles applicable to "time, place or manner" restrictions is entirely misplaced. Those principles apply only when the regulation is content-neutral. *E.g., Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 536 (1980); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975).

[25] If that were the law, a flat ban on commercial "dial-a-porn" would be constitutional because a would-be speaker would still have the ability to publish a sexually explicit magazine or to produce a sexually explicit video instead. *But see Sable, supra.*

Web speakers, and even though most of the users of the Internet do not have Web sites at all.

The Government's argument should be rejected out of hand. *See Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 556 (1975) (" '[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.' ") (quoting *Schneider v. State*, 308 U.S. 147, 163 (1939)). In determining whether a law bans speech, the question should be whether speakers have meaningful opportunities to reach the adult audiences they would like to reach. There must be available modes of expression that, as a technical *and practical* matter, enable speakers to reach those audiences, and without foregoing the distinctive and useful attributes of their chosen medium.[26]

Thus, here, the CDA clearly "bans" speech by barring would-be speakers from reaching the vast majority of potential recipients of their speech who will not seek out an "adult" Web site, but could be reached in newsgroups, listservs, and chat rooms. For a potential speaker who is interested in or outraged by a particular newsgroup posting or chat room conversation and wants to send an immediate reply, it is no answer to say that he could establish his own independent Web site, screen for age, and post his reply several days or weeks later on that site, where it might be accessed, but by a quite different audience.

[26] The Government cites no law supporting its remarkable claim that a law does not ban speech where it leaves "open" an alternative that most people cannot afford. Its brief includes two "*cf.*" cites to *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), and *Sable*. Gov. Br. at 39. But those cases stand only for the proposition that in regulating speech the government may impose costs that are *not* prohibitive in their effects. *See, e.g., Renton*, 475 U.S. at 54 ("In our view, the First Amendment requires only that Renton refrain from *effectively* denying respondents a reasonable opportunity to open and operate an adult theater within the city . . . .") (emphasis added).

Second, the Government ignores the facts. Citing *no* evidence, and contrary to the district court's findings, it simply asserts that effective screening of minors is possible for speakers using *all* modes of communication on the Internet. Thus, it asks this Court to take it on faith that it is technologically feasible to set up adults-only listservs, chat rooms, and newsgroups. Gov. Br. at 37-38. But in the district court, the "Government offered *no evidence* that there is a reliable way to ensure that recipients and participants in such fora can be screened for age" and "presented *no evidence*" that these fora "could be effectively segregated to 'adult' or 'moderated' areas of cyberspace." J.S. App. 50a (emphasis added).[27] Indeed, the Government's own expert admitted there was no such evidence.[28]

Thus, in the real world, speakers will simply have to "choose between silence and the risk of prosecution." *Id.* at 61a. That is a choice Congress cannot constitutionally impose, even in the interest of protecting children.

III. EVEN IF THE CDA DID NOT EFFECTIVELY BAN SPEECH, IT IMPOSES SEVERE BURDENS ON PROTECTED SPEECH BASED ON ITS CONTENT, AND CANNOT SATISFY THE STRICT SCRUTINY REQUIRED FOR SUCH CONTENT-BASED BURDENS.

Even if the CDA were not a ban on protected speech, the foregoing discussion makes clear that the Act imposes serious *burdens* and *restrictions* on speech, based on its

[27] The Government's argument here is flatly inconsistent with its argument in *Shea v. Reno*, 930 F. Supp. at 942 ("The Government *does not claim* that § 223(e)(5)(B) serves as a defense for content providers using all *or even most* forms of on-line communication.") (emphasis added).

[28] *See* J.S. App. 50a ("Government expert Dr. Olsen agreed that no current technology could give a speaker assurance that only adults were listed in a particular mail exploder's mailing list."); *id.* ("Because of similar technological difficulties, individuals posting a message to a newsgroup or engaging in chat room discussions cannot ensure that all readers are adults, and Dr. Olsen agreed.").

content. Such a statute can be upheld only if it directly and substantially serves a compelling governmental interest in the least restrictive way possible. *See, e.g., Simon & Schuster, Inc. v. Members of New York St. Crime Victim's Bd.*, 502 U.S. 105, 115-16 (1991).

The CDA does not meet that test. Indeed, the Government does not really try to satisfy the requirements of strict scrutiny. It studiously refuses to specify the standard of review it must meet, while obliquely arguing for relaxed scrutiny, by drawing analogies to regulation of broadcasting (*Pacifica*) and zoning (*Renton*).[29] The Court should reject this apparent invitation to ignore well-established precedent and water down the applicable standard.

A. Strict Scrutiny Applies Here.

In the district court the Government "appear[ed]" to concede, and in *Shea v. Reno* it *did* concede, that strict scrutiny applies. J.S. App. 67a (Sloviter, C.J.); 930 F. Supp. at 939. These concessions were fully justified: under this Court's precedents, strict scrutiny is required where, as here, a law severely burdens "indecent" expression.[30] Without expressly changing course here, the Government bases its principal defense of the CDA on asserted analogies to *Pacifica* and *Renton*. Neither analogy is apt.

1. *Pacifica.* In *Pacifica*, the Court "did not purport . . . to apply a special standard for *indecent* broadcast-

[29] *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).

[30] *See Sable*, 492 U.S. at 126; *Denver Area*, 116 S. Ct. at 2419 (Kennedy, J., joined by Ginsburg, J.); *id.* at 2429 (Thomas, J., joined by Rehnquist, C.J., and Scalia, J.). The other four Justices in *Denver Area* chose not to resolve the question whether strict scrutiny applies to regulation of indecent material on leased and public access cable channels. They pointed out that two of the three provisions at issue were not direct restrictions on speech but merely authorized cable operators to limit programming. *Id.* at 2386-2394. They did not need to decide the standard applicable to the third provision because they concluded it was unconstitutional under both strict scrutiny and a more relaxed standard. *Id.*

ing." *Denver Area*, 116 S. Ct. at 2415 (Kennedy, J.) (emphasis added). It relied instead on the special nature of *broadcasting*. *Id.* Here, the district court correctly found that "Internet communication, while unique, is more akin to telephone communication, at issue in *Sable*, than to broadcasting, at issue in *Pacifica*." J.S. App. 67a-68a (Sloviter, C.J.). *See also id.* at 129a n.19 (Dalzell, J.). Indeed, many modes of communication on the Internet are more analogous to newspapers or the soapbox in the park.

Every reason given by the *Sable* Court for rejecting application of the *Pacifica* standard to "dial-a-porn" is equally applicable here:

> *Pacifica* is readily distinguishable . . . most obviously because it did not involve a total ban on broadcasting indecent material. . . . The *Pacifica* opinion also relied on the "unique" attributes of broadcasting, noting that broadcasting is "uniquely pervasive," can intrude on the privacy of the home without prior warning as to program content, and is "uniquely accessible to children, even those too young to read." . . . In contrast to public displays, unsolicited mailings and other means of expression which the recipient has no meaningful opportunity to avoid, the dial-it medium requires the listener to take affirmative steps to receive the communication. . . . Placing a telephone call is not the same as turning on a radio and being taken by surprise by an indecent message.

492 U.S. at 127-28 (citations omitted).[31]

The Government asserts that, like indecent broadcasts, "indecent material presented over the Internet 'confronts the citizen . . . in the privacy of the home.'" Gov. Br. at 28 (quoting *Pacifica*, 438 U.S. at 748). That assertion

[31] *See also Bolger*, 463 U.S. at 74 ("Our decisions have recognized that the special interest of the Federal Government in regulation of the broadcast media does not readily translate into a justification for regulation of other means of communication.") (footnote omitted).

completely ignores the contrary findings of the district court. Indecent material on the Internet must be affirmatively sought out; it does not just appear on the screen. *See* J.S. App. 49a ("Communications over the Internet do not 'invade' an individual's home or appear on one's computer screen unbidden. Users seldom encounter content 'by accident.'").[32] Indeed, most online content is preceded by a description before content is actually accessed. *Id.*[33] The Government's own expert acknowledged that "the 'odds are slim' that a user would come across a sexually explicit site by accident." *Id.* (quoting Schmidt). Moreover, finding such material is beyond the ability (not to mention the interest) of the younger children who were the primary focus of concern in *Pacifica*. *See id.* ("A child requires some sophistication and some ability to read to retrieve material and thereby to use the Internet unattended."). And parents have much greater ability to block or screen content on the Internet than to block content on radio or television. *See* J.S. App. 32a-42a.

Moreover, the regulation at issue in *Pacifica* did not ban any speech; it simply channeled speech to certain times of the day when fewer minors would likely be in the broadcast audience. The CDA, in contrast, *bans* indecent speech at *any* time of day.[34] And the Court stressed that violation of the regulation at issue in *Pacifica* did not subject the speaker to *criminal* penalties, as does the CDA,

[32] *See also Shea v. Reno*, 930 F. Supp. at 940 ("Indecent content on the Internet ordinarily does not assault a user without warning: a child cannot gain access to Internet content with the touch of a remote control, and while accidental viewing of indecent content is possible, there is no evidence in this record to suggest that it is likely. Accordingly, we find strict scrutiny appropriate here.").

[33] The district court specifically found that "[a]lmost all sexually explicit images are preceded by warnings as to the content." J.S. App. 49a.

[34] Time channeling is possible for broadcasters, but *not* for Internet speakers. A message can be posted to a newsgroup or Web site at any time of day, and once posted will be accessible 24 hours a day.

and indicated that a criminal prohibition even of broadcast indecency might be unconstitutional. *See Pacifica*, 438 U.S. at 750.[35]

2. *Renton*. There is no basis for the Government's assertion that the criminal prohibition of speech at issue here is "very much like" the zoning restriction that was subjected to relaxed scrutiny in *Renton*. *See* Gov. Br. at 32. In *Renton*, the Court stressed that the zoning law at issue had nothing to do with the impact of speech on the listeners, and was based solely on the *secondary effects* of the presence of adult theatres on the community at large. 475 U.S. at 47. That rationale has no applicability here because the CDA is directly concerned with the alleged harmful impact of indecent expression on listeners. "To take an example factually close to *Renton*, if the ordinance there was justified by the city's desire to prevent the *psychological damage* it felt was associated with viewing adult movies, then analysis of the measure as a *content-based* statute would have been appropriate." *Boos v. Barry*, 485 U.S. 312, 321 (1988) (emphasis added). Thus, the CDA, like all *content-based* restrictions on speech, must be subjected to strict scrutiny. *See Forsythe County v. The Nationalist Movement*, 505 U.S. 123, 134-35 (1992) ("Listeners' reaction to speech is not a content-neutral basis for regulation."); *Boos v. Barry*, 485 U.S. at 321 ("Regulations that focus on the direct impact of speech on its audience" are content-based.). More generally, the CDA is not properly subject to relaxed scrutiny on the ground that it merely regulates the "place" or "manner" of expression, any more than the restriction at issue in *Cohen v. California*, 403 U.S. 15 (1971), could be justified on the ground that it merely sought to regulate the place and manner of opposition to the draft. Time, place and manner restrictions receive relaxed scrutiny only when imposed for content-neutral reasons. *See supra* n.24.

[35] Finally, the Internet has none of the spectrum scarcity or barriers to entry problems the Court has relied upon to justify a relaxed standard for radio and TV. *See* J.S. App. 130a (Dalzell, J.).

Second, the law at issue in *Renton* merely regulated the physical *location* of the theatres. Thus, there was no pressure on speakers to self-censor or risk imprisonment. Here, in sharp contrast, Congress directly regulated the speech itself.[36]

For these reasons, the criminal prohibition at issue here is not "very much like" the zoning law at issue in *Renton*, and the reasons for applying less than strict scrutiny there do not apply here.

B. The Government Has Not Shown That the CDA Serves a Compelling Interest in a Direct and Material Way.

The Government does have a compelling interest in protecting at least some minors from exposure to at least some material that would be considered "indecent." *See Sable*, 492 U.S. at 126. But "[t]hat the Government's asserted interests are important in the abstract does not mean [that the challenged law] will in fact advance those interests." *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2470 (1994). To the contrary, even in a case involving *intermediate* scrutiny, "[w]hen the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must . . . *demonstrate* that the recited harms are *real*, not merely conjectural, and that the regulation will *in fact* alleviate these harms in a *direct and material* way." *Id.* (emphasis added). Here, the Government has done neither.

1. *Existence of the Problem*. Congress made *no* findings regarding the existence or extent of the problem it sought to address.[37] It did not study the amount of "in-

[36] The Government's reliance on zoning laws, like the CDA itself, reflects a fundamental misunderstanding of the nature of cyberspace. Zoning laws are possible only when physical lines can be drawn and it can be determined whether the zoned business is on the right side or the wrong side of the line. But there are no lines or boundaries in cyberspace, and it is not possible to keep cyberspeech within a particular physical zone.

[37] The legislative history of the CDA is summarized in Robert Cannon, *The Legislative History of Senator Exon's Communications*

decent" material on the Internet, the sources of such material (including foreign origin), the extent of minors' actual contact with inappropriate material, or the ability of parents and other adults to control children's access to the Internet.[38] The Government's repeated claims about what Congress "found," *see* Gov. Br. at 5-7, are based on nothing more than individual comments in the congressional debates by a handful of the CDA's supporters, with no apparent empirical basis. Such comments are insufficient to satisfy strict scrutiny. *See Sable*, 492 U.S. at 129-30 (refusing to defer to supposed congressional findings of fact derived "from conclusory statements during the debates by proponents of the bill").

Furthermore, the record in this case is devoid of evidence of the actual extent of the supposed problem. All the Government showed was that sexually oriented materials are displayed in parts of the Internet, and they *could* be reached by a child with "some sophistication and some ability to read." J.S. App. 49a; *see id.* at 47a. This says nothing about the extent to which minors are actually viewing sexually explicit, indecent materials on the Internet. Parents have many ways to control how their children use the Internet—ranging from low-tech options like direct supervision (or simply locking the computer when they are not at home)[39] to parental empowerment devices

Decency Act: Regulating Barbarians on the Information Superhighway, 49 Fed. Comm. L.J. 51 (1996). *See also* Declaration of Senator Patrick J. Leahy in Support of ALA Plaintiffs' Motion for Preliminary Injunction (reciting legislative history of Act).

[38] A single hearing was held by the Senate, but it considered a *different* bill introduced by Senator Grassley. *See Cyberporn and Children: The Scope of the Problem, the State of the Technology, and the Need for Congressional Action*, Hearing Before the Senate Comm. on the Judiciary, 104th Cong. 1 (1995). Testimony and discussion focused on online obscenity and sexual solicitation and harassment of minors—but that type of speech is not at issue here. *See supra* n.2. There was limited discussion of some of the blocking and filtering technologies, but no substantial evidence questioning their efficacy.

[39] *See* Duvall Test., Tr. Vol. I, 107:3-7.

and the child-protection software offered by the major online providers and others. *See* J.S. App. 32a-42a. The record does *not* show that substantial numbers of parents are ignoring these options.

Nor is the Government's position bolstered by its attempt, for the first time on appeal, to redefine the interest Congress supposedly sought to further. The Government now declares that Congress had a purportedly "compelling interest in protecting the First Amendment interests of all Americans in using what has become an unparalleled educational resource." Gov. Br. at 31. It contends that unless the Internet is cleansed of "indecent" material, parents will refuse to bring the Internet into their homes. *Id.* at 30-31.

It is improper for the Government to defend the constitutionality of a law subject to strict scrutiny by conjuring up a new governmental interest on appeal. "To be a compelling interest, the [Government] must show that the alleged objective was the legislature's 'actual purpose' . . . ." *Shaw v. Hunt*, 116 S. Ct. 1894, 1902 n.4 (1996) (citation omitted). "The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation." *United States v. Virginia*, 116 S. Ct. 2264, 2275 (1996). Here, Congress did not find that the CDA was needed to prevent families from shunning the Internet. To the contrary, it specifically found elsewhere in the same Act that the "Internet and other interactive computer services have *flourished*, to the benefit of all Americans, with a *minimum* of government regulation." 47 U.S.C. § 230(a)(4) (emphasis added).[40]

Moreover, there is no evidence in the record to support this newly minted interest. The record shows that Internet use is expanding *exponentially*, *see, e.g.*, J.S. App.

[40] Indeed, Congress declared U.S. policy as "preserv[ing] the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, *unfettered by Federal or State regulation*." 47 U.S.C. § 230(b)(2) (emphasis added).

13a, and market forces are providing an ever-increasing number of user controls, *id.* at 35a, 146a (Dalzell, J.).

2. *Effectiveness of the Remedy.* The Government has not shown that the CDA will advance its interest in preventing minors from gaining access to indecedent materials on the Internet in a "direct and material" way. *Turner*, 114 S. Ct. at 2470. The CDA will not prevent minors from gaining access to indecent material that originates abroad.[41] Because that material constitutes a large percentage of all indecent material available in cyberspace, the CDA, at best, "provides only the most limited incremental support for the interest asserted." *Bolger*, 463 U.S. at 73.

The district court found that a "large percentage, perhaps 40% or more, of content on the Internet originates outside the United States." J.S. App. 59a.[42] It was stipulated that some foreign speech is sexually explicit. *Id.* at 47a, 59a.[43] Because of the global nature of the Internet,

[41] The Government's merits brief does not dispute this point. And the Government's expert acknowledged below that parents would have to rely on SurfWatch and similar *user*-based options to prevent their children from viewing indecent material posted abroad. Olsen Test., Tr. Vol. V, 44:6-45:8, Jt. App. 133-134.

[42] At least 30% of the sexually oriented sites SurfWatch blocks are known to be of foreign origin, and since origin cannot always be discerned, the actual number may be much higher. Duvall Test. Decl. ¶ 41, Jt. App. 104-105; Duvall Test., Tr. Vol. I, 161:17-162:18, Jt. App. 106-107. And, given the fact that some foreign countries are far more permissive than the United States regarding sexual materials, (Schmidt Test., Tr. Vol. IV, 131:14-24, Jt. App. 118), the likelihood of indecent foreign source material will remain high. Moreover, the problem of foreign source material is growing. Foreign networks are being added to the Internet faster than domestic networks, and at trial it was estimated that by now approximately half of all networks would be foreign. Hoffman Test. Decl. ¶¶ 107-113, Jt. App. 108-110; Hoffman Test., Tr. Vol. II, 68:5-69:11, Jt. App. 112-113.

[43] The Government has not challenged here, did not challenge below, and reasonably *could* not challenge the proposition that a very substantial percentage of the indecent communication on the

material posted overseas is just as available as information posted next door. *See* J.S. App. 47a. Moreover, the "pornographic" visual images the Government professes to be most concerned about are likely to be essentially identical regardless of their country of origin. "Pornography from, say, Amsterdam will be no less appealing to a child on the Internet than pornography from New York City." *Id.* at 145a (Dalzell, J.).

Accordingly, "the CDA will almost certainly fail to accomplish the Government's interest in shielding children from pornography on the Internet." *Id. See also Shea*, 930 F. Supp. at 941 (same). Indeed, the evidence showed that, if the CDA were upheld, it would be quite easy for commercial purveyors of sexually explicit speech to post *all* of that speech from abroad. *See* J.S. App. 145a n.22 (Dalzell, J.). Thus, the Act may simply "encourage American pornographers to relocate in foreign countries or at least use anonymous remailers from foreign servers." *Id.*[44]

It is no answer to say that the CDA would initially reduce, perhaps by half, the volume of sexually oriented material available over the Internet by suppressing all domestic speakers. Because of the nature of Internet searching, such a reduction would have *no* effect on the ability of children—acting without supervision and using computers with no screening or blocking—to access sexually oriented images. It would be the equivalent of allowing children to browse in "adult" bookstores after half

Internet—and, in particular, of "pornographic" images—are posted overseas.

[44] *See also* Cannon, *supra*, at 75 ("If the CDA were fully enforced in the United States, content providers could move questionable material or activity outside of the United States and outside the reach of the CDA. The final result would be that the material which Senator Exon sought to ban would remain available to users."); Hoffman Test. Decl. ¶¶ 115-118, Jt. App. 110-111 (anonymous remailers).

the adult books or videos had been removed. Such a law would not "directly and materially" advance the goal of preventing minors from gaining access to indecent materials. *See, e.g., Church of Lukumi Babalu Aye v. City of Hialeah,* 508 U.S. 520, 113 S. Ct. 2217, 2234 (1993) ("It is established in our strict scrutiny jurisprudence that 'a law cannot be regarded as protecting an interest "of the highest order" . . . when it leaves appreciable damage to that supposedly vital interest unprohibited.'" (quoting *Florida Star v. B.J.F.,* 491 U.S. 524, 541-42 (1989)) (Scalia, J., concurring in part and concurring in the judgment); *Florida Star v. B.J.F.,* 491 U.S. at 540-41 (holding that law prohibiting disclosure of rape victims's name in any "instrument of mass communication" but not by other means did not directly and substantially further the law's stated purpose); *Smith v. Daily Mail Publishing Co.,* 443 U.S. 97, 104-05 (1979) (invalidating a law that barred newspapers, but not other media, from publishing names of juvenile offenders).[45]

Had Congress inquired into how the Internet works, it would have learned that it is impossible to prevent minors from gaining access to a substantial volume of "indecent" material by regulating speakers. The solution to that problem must focus on the only place where effective measures can be taken—at the recipient end.[46]

C. A More Narrowly Tailored, and More Effective, Method of Restricting Access By Minors Would Be Promoting the Development and Use of Recipient-Based Controls.

The CDA is also unconstitutional because there are less restrictive measures Congress could have selected that

[45] *See also Denver Area,* 116 S. Ct. at 2416 ("Partial service of a compelling interest is not narrow tailoring.") (Kennedy, J., joined by Ginsburg, J.)

[46] *See* Cannon, *supra,* at 83 ("Government regulation can do nothing to stop [offshore offensive material]. Software can effectively block sites regardless of location.").

would have been much *more* effective in preventing minors from gaining access to indecent online material.

The district court made extensive findings about the ability of user-based software and control mechanisms to prevent children from accessing indecent material, regardless of where it is posted. J.S. App. 32a-42a. The Government ignores these findings. Citing two isolated remarks by one legislator, it claims Congress concluded that these blocking and filtering mechanisms are insufficient. Gov. Br. at 40. In fact, Congress made *no* specific findings regarding the use or effectiveness of these mechanisms. In another section of the Act, however, Congress did make a general finding that is flatly inconsistent with the Government's argument here, concluding that interactive computer services "offer users a *great degree of control* over the information that they receive." 47 U.S.C. § 230(a)(2) (emphasis added).

The Government claims that "parental control software is used by only a very small percentage of households, that have access to the Internet." Gov. Br. at 41. There is no support for this broad assertion.[47] Moreover, the Government ignores the parental control options the major online service providers themselves offer to their 12 million subscribers—options that permit parents easily to block or screen access to the Internet. *Id.* at 41a-42a; *supra* at 6.

The Government's argument that parents may neglect to use these options should be rejected for the same reasons the *Denver Area* Court rejected the Government's argument that "lockboxes" were insufficient to deal with

[47] The Government refers only to SurfWatch and ignores all of the other blocking and filtering software programs available to parents, such as Cyber Patrol, many of which have been made available free of charge to the millions of subscribers to commercial online services. J.S. App. 36a, 39a.

cable television indecency.[48] Even though the Court assumed that parents would have to spend time and money to find and buy cable lockboxes, learn how to use them, and exercise vigilance to ensure they were being used correctly, it nevertheless held that such practical problems "do not show need for a provision as restrictive" as a segregate and block requirement. 116 S. Ct. at 2393. Rather, such concerns called for "informational requirements" urging parents to use "readily available blocking equipment." *Id.* Similarly, here, a far less restrictive means of addressing the Government's concern would be to educate parents and school administrators about the Internet and the availability of blocking and filtering tools, to assist them in acquiring such technologies and information, and to support additional research and development.[49] Indeed, one of the unfortunate consequences of the CDA has been to lull parents into a false sense of security that the government has taken care of the problem when, in fact, the problem is still there and will be *unless* parents exercise parental responsibility.

Congress' decision in another portion of the same Act to rely on user-based controls to address concerns about children's access to "indecent" and "violent" speech on

[48] The analogy is particularly relevant because cable lockboxes operate similarly to the available Internet blocking and screening technologies.

[49] *See* J.S. App. 81a (Sloviter, C.J.) ("When Congress decided that material unsuitable for minors was available on the Internet, it could have chosen to assist and support the development of technology that would enable parents, schools, and libraries to screen such material from their end.").

Such an approach would have been *more* consistent with Congress' statement of U.S. policy in the Act: "to encourage the development of technologies *which maximize user control* over what information is received by individuals, families, and schools who use the Internet and other interactive computer services" and "to remove disincentives for the development and utilization of blocking and filtering technologies that *empower parents* to restrict their children's access to objectionable or inappropriate online material." 47 U.S.C. §§ 230(b)(3), 230(b)(4) (emphasis added).

broadcast television further demonstrates that the CDA is not narrowly tailored. There, instead of focusing on broadcast speakers, Congress focused on the recipients of broadcast speech. It required television manufacturers to install a so-called "V-chip" so that television sets could "read" a code voluntarily assigned to television shows by private entities—thus allowing parents to screen out content they deem inappropriate for their children.[50] As in *Denver Area*, "Congress' different, and significantly less restrictive treatment of a highly similar problem [is] at least *some indication* that more restrictive means are not 'essential.'" 116 S. Ct. at 2393 (emphasis in original).

Recipient-based screening would not prevent all minors from gaining access to indecent material. But the approach adopted by Congress, while imposing much more severe burdens on protected speech, would not prevent *any* minors from gaining access to the substantial volume of indecent material posted abroad. The First Amendment forbids Congress from adopting such a pointless burden on protected speech.

IV. THE CHALLENGED PROVISIONS ARE UNCONSTITUTIONALLY VAGUE.

The CDA "indecency" standard is also unconstitutional because its key terms—"indecent," "patently offensive," "depictions or descriptions of sexual activities," "in context," and "community standards"—fail to provide clear notice of what is permitted and what is proscribed. This constitutional requirement applies with particular force here because First Amendment rights are at stake. *See Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982); *Smith v. Goguen*, 415 U.S.

[50] *See* 47 U.S.C. § 303(x). The "V-chip" is designed to screen not only violence, but also "indecent" and sexually oriented speech. 47 U.S.C. § 303(w)(1). *See also* Act, § 551(a)(8) (citing "compelling government interest in *empowering parents* to limit the negative influences of video programming that is harmful to their children") (emphasis added).

566, 572-73 (1974); *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972); *NAACP v. Button*, 371 U.S. 415, 438 (1963). *See also Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 689 (1968) (statutory purpose of protecting minors does not justify relaxation of these requirements). Vague statutes cause potential speakers to "steer far wider of the unlawful zone," *Speiser v. Randall*, 357 U.S. 513, 526 (1958), "then if the boundaries of the forbidden areas were clearly marked," *Baggett v. Bullit*, 377 U.S. 360, 372 (1964).

The vagueness problem is especially pronounced here for three reasons. First, the CDA is a *criminal* statute that carries very substantial penalties. *See Hoffman Estates*, 455 U.S. at 498-99. Uncertainty concerning the CDA's scope is thus far more likely to result in self-censorship than were the modest civil penalties accompanying the FCC "broadcast indecency" standard. *See Pacifica*, 438 U.S. at 750 (reserving whether criminal penalties could be imposed for indecent speech even in the broadcast context); *see also* J.S. App. 78a (Sloviter, C.J.).

Second, the Internet consists of a set of uniquely affordable modes of communication which are used for informal, spontaneous expression, often in "real time," by millions of ordinary individuals. *See, e.g.*, J.S. App. 29a, 43a, 46a. Unlike magazine retailers (*Ginsberg*), radio stations (*Pacifica*), commercial telephone services (*Sable*), or cable television programmers (*Denver Area*), the vast majority of online speakers do not have the time or the means to retain lawyers to pre-screen their communications.[51] Ordinary Americans are not accustomed to facing imprisonment for their casual utterances and their "hastily typed idea[s]." J.S. App. 29a.[52]

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[51] *Cf. Hoffman Estates*, 455 U.S. at 498 (businesses "plan behavior carefully" and "consult relevant legislation in advance of action," so the precision of statutes regulating business activity need not be as great as in other contexts).

[52] Although the Government attempts to downplay the CDA's application to written text, the Government's brief confirms that

Third, the Internet is a global medium in which speech posted anywhere is available everywhere. J.S. App. 47a. Speakers are thus subject to prosecution in any community in the country for anything they say on the Internet.[53] They must try to ascertain, and tailor their speech to fit, the "community standards" of the least tolerant community in the nation. For example, a speaker wishing to disseminate AIDS awareness or safe sex information would run the risk that such information might be considered patently offensive, and thus subject to prosecution, in one particularly intolerant community.

The utter inability of the law's defenders to agree on its meaning is telling proof of its unconstitutional vagueness. Below, the Government's lawyers and experts were "unable to define 'indecency' with specificity." J.S. App.

Internet users must worry about being prosecuted even for purely textual communications that do *not* involve the so-called "seven filthy words" and that could not subject their authors to prosecution in any other medium. *See* Gov. Br. at 40-41 ("Because indecent material can appear in *numerous verbal forms*, there can be no guarantee that any particular software program will screen all indecent sites simply by searching for particular words or phrases.") (emphasis added).

[53] *See* Amicus Brief of Morality in Media Inc., at 14 n.9. *Cf. Hamling v. United States*, 418 U.S. 87 (1974) (obscenity); *United States v. Thomas*, 74 F.3d 701, 711-12 (6th Cir.), *cert. denied*, 117 S. Ct. 74 (1996) (affirming conviction for online obscenity, and employing Tennessee community standard for material posted in California). The FCC has developed a national "community standard" for broadcast indecency, but that standard (like so much of the broadcast indecency test), presupposes the presence of a single, expert administrative agency to discern and enforce that standard. *See In re Liability of Sagittarius Broadcasting Co.*, 7 F.C.C. Rcd 6873, 6876 (1992) (FCC's indecency standard "does not address a particular geographic area, but relies instead on the expertise of Commissioners drawing on their knowledge of the views of the average viewer or listener, as well as their general expertise in broadcast matters"). If the CDA's drafters intended a single *national* "community standard" for the online "community," *cf.* Br. of Members of Congress at 8-9, they provided *no guidance* about how such a standard should be determined and what its content should be.

99a (Buckwalter, J.). They fare no better here. On the one hand, the Government insists that speech of serious value will rarely if ever violate the CDA. Gov. Br. at 44. On the other hand, the Government, echoing the Conference Report, argues that the CDA's indecency standard is equivalent to the broadcast indecency standard at issue in *Pacifica*, and serious value speech may be found indecent under that standard. The Congressional sponsors of the CDA are more frank in acknowledging that even speech with "truly serious value" can be prosecuted, and admit that juries will be free to determine whether speech is patently offensive based on their assessment of a "host of variables," none of which is specified in the text of the statute itself. Br. of Members of Congress at 13. Yet they contend that the standard of "online indecency" will be *different* from the broadcast standard. *Id.* at 6. Their proposed standard provides even less guidance than does the broadcast indecency standard.[54] Most importantly, whatever the "online indecency" standard "*would*" be, *id.*, it cannot be found in the text of the statute they drafted.

None of the Government's other arguments salvage the CDA. Reasoning from the questionable premise that "one out of three ain't bad," the Government contends that the Court's approval of the *three*-prong liability standards in *Miller v. California*, 413 U.S. 15, 24 (1973), and *Ginsberg v. New York*, 390 U.S. at 632-33—both of which required that expression be "patently offensive"—provides

[54] The Congressional *amici* state that the CDA "would allow unrestricted availability of anything that can be aired on radio or TV, or lawfully sold or displayed to a minor in a store, on a billboard, on one's jacket in public, or provided to a minor by phone, fax, mail, cable, or in a school, museum, or library." Br. of Members of Congress at 6. This explanation is mystifying, because most of the media to which the Members refer are not regulated for "indecency" at all, and those media that are regulated are subject to standards altogether different from the CDA—notably the "harmful to minors" standard in state statutes governing retail sale of books and magazines.

"powerful support" for the conclusion that the CDA is not vague. Gov. Br. at 42.[55]

From the perspective of the potential speaker, however, eliminating two of the three *Miller/Ginsberg* prongs greatly compounds the vagueness of the standard and increases the pressure to self-censor. Under *Miller* and *Ginsberg*, a speaker is safe as long as he knows his speech *either* is not prurient *or* has serious value. In stark contrast, under the CDA, a speaker can be convicted even if his speech (like George Carlin's in *Pacifica*) is not prurient and has serious value.

A criminal prohibition that turns *entirely* on whether listeners (or jurors) find the speech in question "patently offensive" comes perilously near to what the First Amendment most emphatically prohibits. *See Texas v. Johnson*, 491 U.S. 397, 414 (1989); *Bolger*, 463 U.S. at 71. Because of its subjectivity, "offensiveness" is an open invitation to discrimination against unpopular and unorthodox viewpoints. *See Forsythe County*, 505 U.S. at 132-33. Our deep historic distrust of government officials' ability to make "principled distinctions in this area" is why "the Constitution leaves matters of taste and style so largely to the individual." *Cohen v. California*, 403 U.S. at 25.

[55] The Government simply ignores the important fact that the "patently offensive" prong of the *Miller* standard is significantly more precise than the CDA standard because it requires that the speech in question depict or describe "sexual *conduct*" that has been "*specifically defined*" by law. *Miller*, 413 U.S. at 24 (emphasis added). The CDA speaks in far more general terms of "depict[ions] or descri[ptions]" of "sexual or excretory activities or organs." § 223(d)(1)(B).

Moreover, the two prongs of the *Miller* test the CDA *does not* incorporate are especially significant. If indeed the CDA was designed to address the problem of "pornography" on the Internet, then it is simply remarkable that Congress did not make prurient appeal a requirement for liability, for prurience is the *raison d'etre* of pornography. *See Roth v. United States*, 354 U.S. 476, 488 (1957). And the omission of a "serious value" exemption means that the CDA threatens expression at the core of First Amendment values, such as social and political satire, *see Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

The Government's reliance on *Denver Area* is similarly misplaced. The provision upheld there against a vagueness challenge was not a criminal statute; indeed, it was not even a direct governmental restriction of speech. It imposed no sanctions directly on cable programmers (the speakers), but instead authorized certain private parties (cable television operators) to refuse to carry "patently offensive" material over their systems.[56] Because programmers themselves were not subject to liability in *Denver Area*, there was little danger of "chilling" expression through self-censorship.[57] That cannot be said here.

Many of the CDA's constitutional flaws result from Congress' effort to transplant the FCC-administered broadcast indecency standard to a *criminal* statute "administered" by hundreds of prosecutors, juries and judges. *See* Conf. Rep. at 188 (adopting FCC standard from *Pacifica*); Br. of Members of Congress at 7-8.[58] It is common for an

[56] As both the plurality and the dissenters noted, cable television operators' *own* First Amendment rights were importantly at stake in *Denver Area*, and weighed in favor of vindicating the operator's authority to exclude material from their networks. By contrast, the CDA criminalizes speech based on its content, the paradigm case where the First Amendment "interests" all run in one direction—in favor of the speaker.

[57] The *Denver Area* plurality also stressed several aspects of the law that limited operators' discretion to construe the "patently offensive" standard too broadly, or to apply it arbitrarily, including the requirement that cable operators develop a "written and published policy" explaining their basis for barring programming, the programmer's ability to challenge the "reasonableness" of a cable operator's decision (without risking imprisonment), and regulatory oversight by local licensing authorities. 116 S. Ct. at 2390. No limitations are applicable here.

[58] Although the Conference Report cites *Pacifica* and the FCC broadcast indecency standard as the source and model for the CDA, the Report proceeds to misstate the FCC standard in critical ways. For example, the Report mistakenly states that the CDA standard protects serious value speech because the FCC broadcast standard requires "intention to be offensive," and "material with serious redeeming value . . . is quite obviously intended to edify and educate, not to offend." Conf. Rep. at 189 (quoted in Gov. Br. at 42). But the broadcast standard *does not* include an "intention to offend" requirement (which would make it nearly impossible to convict even "pornographers"). Far from immunizing "serious-value" speech, the FCC decision cited in the Conference Report confirms that "merit" is just "one of the many variables that make up a work's 'context'," adding that serious value receives no "greater weight than [the FCC] give[s] other variables." *Infinity Broadcasting Corp.*, 3 F.C.C. Rcd 930, 933 (1987) (cited, under an erroneous title, at Conf. Rep. at 189).

administrative agency to apply, and over time refine, a standard requiring consideration of a "host of variables," *Pacifica*, 438 U.S. at 750 (quoted in Br. of Members of Congress at 11, 13), that have to be balanced against each other in an *ad hoc* fashion.[59] But such a standard is obviously ill-adapted—substantively and procedurally—for a criminal statute. Neither the Government nor *amici* can explain how potential speakers on the Internet can reasonably predict how this multivariate calculus would apply to what they propose to say, so they may decide whether to speak or not. The result will obviously be that many speakers will simply "steer . . . wide[] of the unlawful zone." *Speiser*, 357 U.S. at 526.

As the district court recognized, the Government's position reduces to an appeal that it be "trusted" to restrict the CDA to only "reasonable" uses. J.S. App. 82a-83a (Sloviter, C.J.), 98a-99a (Buckwalter, J.). But the void-for-vagueness doctrine is designed to save regulated parties, especially parties who wish to *speak*, from having to rely on the grace of "well-intentioned prosecutors." *Baggett v. Bullitt*, 377 U.S. at 373. *See also Keyishian v. Board of Regents*, 385 U.S. 589, 599 (1967).

V. THE DISTRICT COURT DID NOT ERR IN PRELIMINARILY ENJOINING ALL THREE CHALLENGED PROVISIONS.

The district court unanimously concluded that all three challenged provisions were likely to be found unconstitu-

[59] The "variable" that was important in *Pacifica* itself—the time of day of the speech—has little or no application in cyberspace. *See supra* n.34.

tional. J.S. App. 62a. Below, the Government made no real effort to distinguish between these provisions. On appeal, however, the Government attempts for the first time to defend the three provisions separately, arguing that even if the "display provision" (§ 223(d)(1)(B)) is unconstitutional, the other two provisions (§§ 223(a)(1)(B) and 223(d)(1)(A)) are not. Those provisions should be construed, the Government now asserts, to require "knowledge" that at least *one* recipient of the speech is a minor. The fundamental question remains, however, whether that minor must be the *only* recipient.

Section 223(a)(1)(B) criminalizes an indecent transmission "knowing that *the* recipient" is a minor. (Emphasis added.) The example posed by the Government when addressing this section hypothesizes a speaker who learns that *one* of the recipients of his speech in a chat room is a minor and then *separately* sends a "private" indecent e-mail message to that minor alone. Gov. Br. at 24. It is left unclear whether, if the speaker transmits that same indecent message to the chat room, that would violate § 223(a)(1)(B) as well, even if everyone else in the chat room was an adult.[60] If so, § 223(a)(1)(B) poses the same constitutional issues as the display provision, because speakers cannot control who can access their speech in most modes of communication in cyberspace, including the very example the Government uses, chat rooms.[61]

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[60] The fact that the Act's defenses, by their terms, apply to §§ 223(a)(1)(B) and 223(d)(1)(A) indicates that Congress intended those sections to criminalize speech when *any* recipient is known to be a minor, even if most recipients are adults. In its Opposition to the Motion to Affirm filed by the ACLU Appellees, the Government expressly stated that it interpreted *both* provisions as applying when *any* (not the *only*) recipient was known to be a minor. Gov. Opp. Br. at 4 n.1.

[61] It is also unclear what "knows" means in this context. *Compare Ginsberg*, 390 U.S. at 646 (defining "knowingly" in context of state "harmful to minors" statute). In a chat room or newsgroup addressing topics of interest to both minors and adults, the speaker may "know" (in the sense of being virtually certain or having substantial reason to believe) that at least one of the recipients is a minor. Conversely, because it is technologically impossible to verify the age of recipients in newsgroups or chat rooms, the speaker cannot actually "know" that one of the recipients was a minor even if one *claims* to be a minor. In the Government's hypothetical, however, once one recipient falsely claims to be a minor, the speaker would have to refrain from any indecent communication even if, in fact, all of the recipients are adults. It is also unclear what the speaker can lawfully do if the only recipient who claims to be a minor then claims (truly or falsely) that he is *leaving* the chat room or the newsgroup. Could the speaker then resume indecent communications?

Section 223(d)(1)(A) even more clearly poses the same constitutional problems as the display provision. That section makes it a crime "to send" a patently offensive communication "to a specific person or persons" under 18. Literally, it would be a crime to post a message to a newsgroup or chat room with knowledge that *any* "specific" recipient is a minor, even if every other recipient is an adult. The Government's assertion that this provision nonetheless "does not prohibit adult-to-adult communications" (Gov. Br. at 25) is merely a restatement of its incorrect argument that speakers can comply with the CDA's defenses, and can therefore limit their speech to adults. As found by the district court and demonstrated in Point II, *supra*, however, that argument is wrong.

The Government's exclusive reliance on *Ginsberg* is entirely misplaced. In *Ginsberg* the New York "harmful to minors" statute imposed *no* ban or burden on the distribution of constitutionally protected materials to adults because, as the Court stressed, it *was* possible for commercial booksellers to confine their in-person sales of magazines to customers who were known to be adults. Therefore, the law at issue in *Ginsberg*, unlike the CDA, was "not invalid under [the Court's] decision in *Butler*." 390 U.S. at 634.[62] Nor was there any issue in *Ginsberg*

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[62] Moreover, *Ginsberg* involved material that was "obscene for children," 390 U.S. at 635-36, a standard specifically rejected by Congress in adopting the CDA. Conf. Rep. at 189. And the *Ginsberg* Court expressly declined to opine as to the constitu-

as to the efficacy of the prohibition: the regulated sales all took place within the regulating jurisdiction, where all violations could be prosecuted. Here, as the district court found, the CDA cannot stop the transmission of indecent communications from foreign sources, even if the speaker knows the recipient is a minor.

Finally, the Government's new construction of these two provisions does not eliminate or reduce their vagueness. *See supra* Point IV.

If the Government's new interpretations raise any question regarding the propriety of the district court's conclusion that these two provisions are likely to be found unconstitutional, the proper course is for the Court to affirm and allow the district court, when considering permanent relief, to develop a record that is relevant to those new interpretations.[63] This Court should not itself undertake to review, *ab initio*, without a record, the constitutionality of these newly coined constructions.

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tionality of restricting minors' access to material under any other standard. 390 U.S. at 636-37. In addition, *Ginsberg* applied solely to commercial purveyors of sexually oriented material. The Court stressed that "the prohibition against sales to minors *does not bar parents* who so desire from purchasing the magazines for their children." *Id.* at 639 (emphasis added). Unlike in *Ginsberg*, under the CDA it would be unlawful for a parent to transmit indecent communications to his or her teenager. Similarly, it would be unlawful for a college professor to communicate indecent literature to a 17-year-old college student (for example, *Ulysses* or *Lady Chatterly's Lover*). And it would be a felony for two teenagers to exchange "indecent" or "patently offensive" jokes. The Government makes no pretense that it has a compelling interest in criminalizing such communications.

[63] Because the Government did not advance these interpretations of §§ 223(a)(1)(B) and 223(d)(1)(A) below, there is no evidence in this record regarding the types and extent of one-to-one "indecent" communications to known minors that are occurring on the Internet. If, for example, those communications are principally unlawful child solicitations, they are irrelevant to this case because Appellees did not challenge and the district court did not enjoin the provisions prohibiting child solicitation, child pornography, or obscenity. *See supra* n.2.

VI. THE ACT CANNOT BE SALVAGED BY SEVERANCE OR BY A NARROWING CONSTRUCTION.

The Government argues that the district court erred in enjoining enforcement of the CDA as a whole, and should have allowed enforcement against "commercial" speakers who charge for their speech. Gov. Br. at 45-48. This argument is without merit for several reasons.

First, despite its rhetoric, the Government is not really advocating "severance." This is not a situation in which the Court can strike some word or phrase or section in the Act and leave the remainder intelligible and enforceable as written. *Compare Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504-05 (1985) (upholding obscenity statute to extent the word "lust" could be excised); *United States v. Grace*, 461 U.S. 171, 180-81 (1983) (narrowing statute's application based on categories identified in the statute).[64] What the Government is really advocating is that this Court rewrite the Act to apply only to a narrow category of commercial speakers not singled out in the Act.[65]

Second, the premise of the Government's argument is wrong: the Act is unconstitutional in *all* of its applications. Contrary to the Government's assertion, *see* Gov.

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[64] The Government's reliance on the severability clause of the 1934 Communications Act, 47 U.S.C. § 608, is misplaced. The presence of a severability clause does not provide an independent basis for a court to create statutory distinctions that will dramatically alter the substantive reach and basic functioning of a statute. A severability clause only raises a presumption that, where appropriate, Congress generally would want valid provisions of a statute to be separated from invalid ones. It "is an aid merely; not an inexorable command." *Dorchy v. Kansas*, 264 U.S. 286, 290 (1924); *United States v. Jackson*, 390 U.S. 570, 585 n.27 (1968) ("whatever relevance such an explicit clause might have in creating a presumption of severability . . . the ultimate determination of severability will rarely turn on the presence or absence of such a clause") (internal citation omitted).

[65] Congress clearly intended to regulate "both commercial and non-commercial" speakers. Conf. Rep. at 191. *See supra*, 11-12.

Br. at 47, the district court did not conclude that the Act could be applied constitutionally even to commercial speakers who charge for their speech. The fact that they (and they alone) could screen for age does not cure the vagueness of the terms "indecent" and "patently offensive" as standards for criminalizing speech in cyberspace. *See Whitehill v. Elkins*, 389 U.S. 54, 58-59 (1967) (holding statute void for vagueness and declining to consider severability clause and proposed narrowing construction because with a vague statute, the "difficulty goes deeper"); *accord Kolender v. Lawson*, 461 U.S. 352, 358 n.8 (1983). Moreover, because most such speakers already require credit card payment for access to their speech, limiting the scope of the Act to those speakers would do almost nothing to further the Government's interest.

Third, a law that, on its face, unconstitutionally restricts speech in the vast majority of its applications is subject to facial invalidation. *Forsythe County*, 505 U.S. at 129-30; *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 574-75 (1987); *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). Such a law cannot be sustained—even in part—by a showing that it has *some* constitutional applications. A facially unconstitutional statute can be salvaged only if it is " 'readily susceptible' to a narrowing construction" that eliminates its unconstitutional applications. *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 397 (1988). A statute is not "readily susceptible" to a narrowing construction if adopting that construction would require the Court to draw lines based upon policy choices that are legislative in nature, especially where congressional intent is unclear. *See United States v. National Treasury Employees Union*, 115 S. Ct. 1003, 1019 (1995).[66] The Court "will not rewrite a . . . law to

[66] As the Court recognized in *United States v. Reese*, 92 U.S. 214, 221 (1875), "[i]t would certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large. This would, to some extent, substitute the Judicial for the Legislative Department of the government." *See also Osborne v. Ohio*, 495 U.S. 103, 121 (1990) (noting that judicial rewriting of statutes would diminish Congress' "incentive to draft a narrowly tailored law in the first place").

conform it to constitutional requirements." *Id.; see also Blount v. Rizzi*, 400 U.S. 410, 419 (1971) (refusing to rewrite a federal obscenity law because "it is for Congress, not this Court, to rewrite the statute").

Limiting the CDA to commercial speakers would require the Court to make legislative judgments about the appropriate reach of Congress' first attempt to regulate communications in this new and rapidly changing medium. For example, what is the definition of a "commercial" speaker: one who charges for access to his or her speech, or any money-making enterprise? Should the statute be narrowed to apply only to "commercial pornographers," as the Government suggests in its Jurisdictional Statement, J.S. at 26, or should it sweep more broadly to encompass all "commercial Web sites," as the Government suggests in its merits brief? Gov. Br. at 46. These are policy judgments Congress must make. As in *NTEU*, there is no way to identify the line Congress would have drawn had it enacted a narrower CDA. It is certainly not possible for this Court to discern what Congress would have done if it had had the benefit of the comprehensive record developed in this case.

"To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of [a court's] duty." *United States v. Reese*, 92 U.S. 214, 221 (1875).

CONCLUSION

For all the foregoing reasons, the Court should affirm the three-judge district court's order issuing a preliminary injunction.

Respectfully submitted,

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